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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
PORTLAND DIVISION

MICHAEL G. SCHWERN,

Case No. 3:14-CV-00146-PK

Plaintiff,

**PLAINTIFF'S SUPPLEMENTAL  
MEMORANDUM IN OPPOSITION TO  
DEFENDANT'S MOTION TO STAY  
PENDING APPEAL**

v.

NÓIRÍN PLUNKETT,

Defendant.

Plaintiff Michael G. Schwern, through counsel, respectfully submits this supplemental memorandum in opposition to defendant Nóirín Plunkett's motion to stay pending appeal.

Defendant argues:

Plaintiff cites the wrong standard in support of his third argument, relying on a case applying the stay requirements of the Administrative Procedures Act, which in turn cites a case applying the preliminary injunction standard pending appeal. Neither case discusses the standard that applies to a stay pending appeal from the denial of an anti-SLAPP motion, for which the Oregon Legislature has set the standard — a stay is automatic.

Reply at 4; *see* Response at 6, citing *Humane Society of the United States v. Gutierrez*, 558 F.3d

896 (9th Cir. 2009) (which cites *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7,

PLAINTIFF'S SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO DEFENDANT'S  
MOTION TO STAY PENDING APPEAL – Page 1

129 S.Ct. 365, 374, 172 L.Ed.2d 249 (2008)).

Defendant is incorrect as a matter of law. The test for a stay pending appeal cuts across numerous case types. A quick sampling of recent Ninth Circuit cases applying the standards for stays demonstrates conclusively that the *Winter* test is used in case types other than those arising under the Administrative Procedures Act.

<b>Citation</b>	<b>Case type</b>	<b>Used <i>Winter</i> test?</b>
<i>Wood v. Ryan</i> , __ F.3d __ (9th Cir. July 22, 2014)	Death penalty	Yes
<i>Alaska Survival v. Surface Transportation Board</i> , 704 F.3d 615 (2012)	Environmental	Yes
<i>Lair v. Bullock</i> , 697 F.3d 1200 (9th Cir. 2012)	Election – First Amendment	Yes
<i>Leiva-Perez v. Holder</i> , 640 F.3d 962 (9th Cir. 2011)	Immigration	Yes
<i>Stormans Inc. v. Selecky</i> , 526 F.3d 406 (9th Cir. 2008)	Reproductive rights	Yes

As for defendant's argument that plaintiff has conflated the stay factors with the factors for a preliminary injunction, defendant should blame the Ninth Circuit rather than plaintiff. Stays and preliminary injunctions are both forms of short-term equitable relief. It is unsurprising that the Ninth Circuit should adapt the test for whether a party qualifies for one form of short-term equitable relief to a situation where a party is applying for another form of short-term equitable relief. And it is indisputable that the Ninth Circuit has actually done so and that district courts have appropriately followed the Ninth Circuit in doing so. *See e.g. Latta v. Otter*, case no. 1:13-CV-00482-CWD, order denying stay pending appeal (#100) (D. Idaho May 14, 2014).

When the correct factors are applied, defendant's arguments for a stay are unavailing. Despite filing a reply memorandum, defendant still has not articulated how she qualifies for a stay under the *Winter* test. The Court should deny defendant's motion.

RESPECTFULLY SUBMITTED July 23, 2014,

/s/ Bear Wilner-Nugent  
 Bear Wilner-Nugent, OSB #044549  
 Attorney for Plaintiff